

[REDACTED]

September 27, 1990

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VIA TELECOPIER (202-326-2050)

Thomas Hancock, Esq.
Pre-merger Notification Office
Federal Trade Commission
Washington, D.C. 20580

Dear Mr. Hancock:

This letter is a follow-up to our telephone conversation of September 26 wherein I requested the views of the pre-merger office with regard to a pre-merger notification rule interpretation. The situation I described was sufficiently unique that you requested this letter, which restates the relevant facts, so that you could consult with your colleagues before responding to my inquiry. I appreciate you taking my telephone call and the opportunity to present the issue to you for your consideration. The question ultimately at issue in my fact situation is the size of the acquiring person. That, in turn, will be determined by the application of the Rule 801.1(b) definition of "control," especially 801.1(b)(2).

Facts Assumed

The factual setting I presented to you is as follows:

Corporation A is a recently formed [REDACTED] nonprofit corporation (having no corporate members) and a self-perpetuating Board of Directors. It intends to arrange financing in order to acquire assets from

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Corporation C, an entity which has annual net sales or total assets of \$100,000,000 or more, at an acquisition price which will satisfy the "size of transaction" test.

Corporation B is an inactive, [REDACTED] nonprofit corporation which has been in existence for approximately one year. It has no corporate members and a self-perpetuating Board of Directors.

A bylaw provision of Corporation A states:

"Notwithstanding any other provision of these bylaws, at all times a majority of the directors of the Board of Directors of the Corporation shall be directors of the Board of Directors of B."

Please further assume that there is no contract as such between Corporations A and B which addresses the issue of B's power to designate members of the Board of Directors of A.

Question Posed

The question I posed to you is whether the above-referenced bylaw provision of Corporation A represents "control" within the meaning of Rule 801.1(b) such as to result in a determination that Corporation B is the ultimate parent entity of Corporation A for purposes of computing the annual net sales and total assets of the acquiring person under Rule 801.11.

Additional Information

Since we spoke, I have acquired some further information relevant to your consideration of this request for an informal opinion:

1. The bylaws of Corporation B provide that the Board of Corporation B can remove any directors of B without cause by a majority vote of the directors then in office. This fact, coupled with the overlapping director requirement of Corporation A's bylaws as referenced above, means that if Corporation B does not wish any of its current Board members to serve as directors of Corporation A, the Board of B can remove such individual(s) from the Board of Directors of Corporation B, thereby eliminating the eligibility of such individual(s) to serve as a common director of both Corporations A and B. The

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practical result is that the Board of Directors of Corporation B can control the composition of a controlling majority of the Board of Directors of Corporation A.

2. Corporation B has been determined exempt from Federal income tax under Section 501(c)(3) of the Internal Revenue Code ("IRC"). In addition to Corporation B, the exemption determination applies to all "subordinate" organizations of Corporation B (the "Group Exemption Determination"). By the inclusion of the above referenced overlapping director requirement in the bylaws of Corporation A (thereby meeting the "control" element of Corporation B's Group Exemption Determination) and by the satisfaction of other requirements contained in the exemption determination, Corporation A is a subordinate of Corporation B and is therefore exempt from Federal income tax under Section 501(c)(3) of the IRC.

Request for Interpretation

I understand from our telephone conversation that you will share this letter or its contents with your colleagues in the Pre-merger Notification Office and contact me with your views, based on the facts described in this letter, regarding whether Corporation B "controls" Corporation A within the meaning of Rule 801.1(b).

A prompt response would be most appreciated given that further analysis of the necessity for filing, and/or a filing itself, necessitates, as a threshold matter, a determination on the "control" issue. If you have any further questions that you consider relevant to your determination, please contact me at the above telephone number. I look forward to a prompt response to our inquiry.

Sincerely,

[Redacted Signature]

[Redacted Initials]

10/1/90
B controls A because B has the power to eliminate directors of A

TH

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TH